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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Amendment of the Commission's)

Rules Regarding Installment Payment)

Financing For Personal Communications)

Services (PCS) Licensees)

ORIGINAL

WT Docket No. 97-82

PETITION FOR RECONSIDERATION**Introduction**

Cellexis International, Inc. ("Cellexis"), pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, respectfully requests reconsideration of certain aspects of the Second Report and Order in the above-captioned proceeding.¹

Specifically, the FCC should:

1. Provide C block licensees with the restructuring option advocated by the Small Business Administration which defers principal and interest payments for five years;
2. Permit licensees to utilize their full down payment in the Disaggregation and Prepayment options and to take advantage of the "built out" exception;
3. Adjust the Prepayment option to account for the net present value of forgoing installment payments; and,
4. Limit participation in the reauction to designated entities.

By: [Signature] /
 Date: [Signature]

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order, WT Docket No. 97-82, FCC 97-342, rel. Oct. 16, 1997 ("Restructuring Order").

Cellexis is one of the largest distributed prepaid wireless service providers in the U.S. The company currently provides its innovative wireless prepaid platform in several major markets throughout the U.S., including Boston, Phoenix, Tucson, Albuquerque, Denver, Salt Lake City, Seattle, and San Francisco.

Cellexis was founded and built by adhering to honest business ethics and solid hard work. In 1995 we were honored with the "Entrepreneur of the Year" award granted by Inc. Magazine. We currently employ over 60 persons who depend on our ability to compete as a wireless reseller.

C Block Licensees Are Crucial to PCS Resale Opportunities

Cellexis' viability as a national reseller rests on the success of the C block, which we have renamed the "Consumer" block.² Our entire business plan has been developed around the opportunity afforded us by true and fair competition.

While we have attempted to work with the A and B block carriers, our experience has shown that many of these carriers thwart our growth efforts and have attempted to ensure that we not be competitive since they can always offer our customers unpublished rates at will.

The recently completed C block restructuring proceeding further strengthened the incumbent's dominance of the wireless marketplace. The menu of options provided under the Restructuring order will not result in a robust C block market on a favorable timetable, which is critical to the success of the resale community. The only beneficiaries of its a policy are incumbents and reauction "vultures," who will deprive U.S. taxpayers of the true value of

² See Cellexis International, Inc., *ex parte* Letter, June 20, 1997, ("Cellexis *ex parte* letter").

the spectrum. We hope that you will reconsider the impact that the order will have on this important sector of the telecommunications industry.

**The Wireless Telecommunications
Marketplace Is Dominated By Incumbents**

While some may casually view four or five carriers in a market as competitive, evidence, both in the press and from our own experience, demonstrates how incumbents, not consumers, benefit from the current market structure. San Diego, for example, has five carriers in service, four of which already offer digital service. Nevertheless, even for the *heaviest* wireless user – 400+ minutes a month – the average cost per 2.4 minute call remains a luxury at 59 cents.³ For light users, the average 2.4 minute call costs an astounding \$2.50 to \$6.66.⁴ Empirically, five carriers have not brought about dramatic consumer benefit, and even with five cellular/PCS carriers in one market, wireless is *not* offering economic local loop competition. And, we would maintain that this level and style of competition will never bring about dramatic consumer benefit.

Even more compelling is an analysis based on the Herfindahl-Hirschman Index (HHI), which the Department of Justice (DOJ), the National Association of Attorneys General and the Federal Trade Commission use as a guideline to evaluate industry concentration in antitrust cases.⁵ While the HHI is not the sole determinant of an anti-competitive market, it can provide guidance on whether a market's structure may result in diminished innovation, price fixing, and limitation of output.

Guidelines for assessing an industry's HHI are:

³ CTIA.

⁴ San Diego Union-Tribune, Aug. 26, 1997.

⁵ The HHI is calculated by squaring the market share of each competitor and summing these squares.

Less than 1000	"acceptable concentration"— where there can be no implicit coordination between firms, and no action would be taken
1000 to 1800	"moderate to high concentration"— the zone where a small change in concentration is considered critical, and where action may be necessary depending upon other factors
More than 1800	"very high concentration"—where anticompetitive behavior is possible, and action probably would be taken

Even if we were to propose the theoretically possible, but highly unlikely, scenario of four robust carriers equally splitting the broadband wireless market, the HHI would still be 2500 in a market – well in the range of “very high concentration.” The most competitive, but totally improbable, scenario that is possible in the current environment is six robust carriers with equal market penetration. This scenario still yields an HHI of 1666, or at the high end of the “moderate to high concentration” portion of the index. If the Commission continues on the path outlined in its Restructuring order, and C block spectrum falls into the hands of small businesses affiliated with incumbents, or incumbents themselves, as Nextel suggests, the best a consumer can expect is a “very highly concentrated” market.

Resellers provide a compelling solution to the high concentration levels that currently exist in the wireless industry. By purchasing wholesale minutes from other carriers, resellers effectively increase the number of competitors in a marketplace, thus reducing concentration levels. However, as mentioned, cellular and A and B block carriers have frustrated Cellexis' attempt to gain entry into the PCS resale marketplace. The C block presents the last, best hope for the resale industry to provide true competition in the wireless industry.

Deferral

Cellexis submitted an *ex parte* letter dated June 20, 1997 expressing our support for restructuring of the C block debt. We believe that the proposal put forth by the Small Business Administration which advocates a five year deferral is a balanced solution that will accelerate network buildout and commercialization while keeping the Government whole in terms of principal and interest payments.⁶

A deferral will provide C block licensees with sufficient time to construct networks and begin to generate revenues before license payments begin. Such a solution is a very common commercial lending practice, and we should expect no less from the "lender" to the C block.

A number of bidders have argued that a deferral will harm auction integrity.⁷ However, the deferral plan offered by the Small Business Administration will ensure that auction integrity is maintained because the Government receives every penny of principal and interest that was originally pledged. We are concerned that the Reconsideration order is so stringent as to be punitive to C block licensees, particularly in light of the Commission's flexible approach to spectrum management policy witnessed in the WCS and the Digital Electronic Message Service⁸ proceedings.

⁶ See Jere W. Glover, Chief Counsel, U.S. Small Business Administration and Jenell S. Trigg, Assistant Chief Counsel, Telecommunications, to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission, *ex parte* Letter, September 8, 1997.

⁷ See, e.g., Joint Comment of Cook Inlet Region, Inc., and Cook Inlet Western Wireless PV/SS PCS, L.P., Western Wireless Corporation, Aerial Communications, Inc., AirGate Wireless, L.L.C., Telecorp, Inc., Airadigm Communications, Inc., WT Docket 97-82, (June 23, 1997) at p. 17 and Reply Comments, (July 8, 1997) at pps 4-5; Comments of Nextel Communications, Inc., WT Docket 97-82, (June 23, 1997) and Reply Comments, (July 8, 1997); Comments of Omnipoint Corporation, WT Docket 97-82, (June 23, 1997) and Reply Comments, (July 8, 1997).

⁸ See *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band For Fixed Service*, ET Docket No. 93-62, Order, FCC 97-95 (March 14, 1997), *on Recon.*

The Commission Should Modify its Restructuring Order in To Allow the Use of a Licensees' Full Down Payment and to Avail Themselves of the "Built-Out" Option

The Commission should eliminate the provisions in the Restructuring order which require C block licensees to forfeit a percentage of their down payments under the Disaggregation and Prepayment options. Such provision is overly punitive and does not further the Commission's goal of fostering competition in the wireless marketplace. If the Commission believes a penalty is necessary to protect the integrity and fairness of the auction rules, we respectfully propose that the Commission increase the build out requirements for C block licensees. Such action will set an important precedent to be heeded by future auction participants, and will provide consumers with all of the benefits of increased competition.

Furthermore, the Commission should provide licensees that select the Disaggregation or Prepayment option and that have substantially "built out" certain markets to avail themselves of the same provisions provided to licensees that select the Amnesty option. Specifically, licensees selecting the Disaggregation or Prepayment option should be permitted to selectively surrender certain licenses penalty-free and with full debt forgiveness. In addition, the Commission should permit such licensees to fully participate in the reauction. This modification of the Restructuring order will remove certain disparities between menu options, while allowing licensees who have committed substantial capital in a market to continue network build-out unabated.

The Commission Should Discount Bids to Net Present Value Under the Prepayment Option

Licensees factored the net present value of their bids into their bidding strategies. The FCC, after years of deliberation, gave entrepreneurs ten years to repay, recognizing expressly that the ability to defer payments was a benefit to small businesses. The Commission decision in the Second Report and Order completely overlooks this point. It appears that a majority of the Commissioners concluded that the Commission should no longer be a banker. Unfortunately, however, to change horses in mid stream leaves not only numerous C block companies, but also resellers and other companies dependent upon them, in a very difficult position. If the Commission decides not to permit deferral – the best course from resellers', other supplier companies', and taxpayers' point of view – it should provide a meaningful alternative to bankruptcy. The existing Prepayment option is not one.

Participation in a Reauction

We strongly urge the Commission to retain its existing rules that limit participation to only qualified entrepreneurs in any reauction of C block licenses. We note with specific concern the hubris demonstrated by Nextel in its Comments dated November 13, 1997 in WT Docket No. 97-82. Here Nextel states:

At this late date, the Commission cannot expect new entrant, novice entrepreneurs to enter the broad consumer marketplace expecting to compete effectively against the likes of AT&T Wireless, Sprint Spectrum, BellSouth and Southwestern Bell and other wireless providers operating mature, established systems offering name-brand services. In this marketplace, only those companies – large or small -- that have established themselves as providers in particular markets, or that are new entrepreneurial companies with a unique, affordable and technologically-advanced service (for which they can attract significant capital to build out their systems) can expect to put the re-auctioned spectrum to its highest and best use. Therefore, the Commission should make these licenses available to all qualified bidders. (Page 8.)

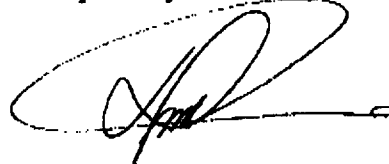
The essence of this argument is that, as a general matter, only incumbents are likely to make it in the wireless market. It is the 1990's version of the Bell System's point of view when Bill McGowan and MCI challenged the then-incumbents' world view with a new vision of long distance competition. Even with PCS rapidly coming online, the evidence is that there are very limited pricing or features of any marketplace attractiveness available from PCS and cellular incumbents --- and Nextel --- for resellers such as Cellexis. The resale community in voice wireless has had its growth stunted by the practices of these companies to impede new competitors' entry, or to ensure that resale only exists at the fringes of incumbents' oligopoly market structure.

Most wireless players today both in cellular and in PCS are the beneficiaries of the legacy of the wireline set-aside, lottery give-aways and Commission waivers of SMR rules. And, once they entered the market they set about dominating it as an oligopoly. This fact has not changed and the Commission and Congress must strengthen the existing C block policy to ensure that the creative ideas of new entrants, the very "novice entrepreneurs" that Nextel disparages, are brought to the marketplace.

Conclusion

Rapid build-out of the C block is necessary to further the Commission's goals of increased competition in the wireless industry. The Reconsideration order did not provide C block licensees with a commercially reasonable menu option to achieve this goal. We respectfully request the Commission to reconsider its decision.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Douglas V. Fougnes', with a large, sweeping loop at the end.

Douglas V. Fougnes

CEO, Cellexis International